ECORD
AND
RIEFS

Nos. 16-1436 and 16-1540

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,

Petitioners,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,

Respondents.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,

Petitioners,

v.

STATE OF HAWAII, *et al.*,

Respondents.

On Writs of Certiorari to the U.S. Court of Appeals for the Fourth and Ninth Circuits

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BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The Constitution and Acts of Congress confer on the President broad authority to prohibit or restrict the entry of aliens outside the United States when he deems it in the Nation's interest. Exercising that authority, the President issued Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017). Section 2(c) of that Order suspends for 90 days the entry of certain foreign nationals of six countries that Congress or the Executive previously designated as presenting heightened terrorism-related risks, pending a review of screening and vetting procedures to assess what information is needed from foreign governments. Section 6(a) suspends for 120 days decisions on refugee applications and travel under the U.S. Refugee Admission Program for aliens from any country, pending a similar review of that program, and Section 6(b) reduces to 50,000 the maximum number of refugees who may be admitted in Fiscal Year 2017. The court of appeals in No. 16-1436 held that Section 2(c) likely violates the Establishment Clause and affirmed a preliminary injunction barring its enforcement against any person worldwide. The court of appeals in No. 16-1540 held that Sections 2(c), 6(a), and 6(b) likely exceed the President's authority under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq., and affirmed a preliminary injunction barring their enforcement against any person worldwide.

The questions presented are:

1. Whether respondents' challenges to Section 2(c)'s temporary entry suspension, Section 6(a)'s

temporary refugee suspension, and Section 6(b)'s refugee cap are justiciable.

2. Whether respondents' challenges to Section 2(c) became moot on June 14, 2017.
3. Whether Sections 2(c), 6(a), and 6(b) exceed the President's statutory authority under the INA.
4. Whether Sections 2(c), 6(a), and 6(b) violate the Establishment Clause.
5. Whether the global injunctions are impermissibly overbroad.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund ("EFELDF") is a nonprofit organization founded in 1981 and headquartered in Saint Louis, Missouri.[1] For more than thirty-five years, EFELDF

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[1] This *amicus* brief is filed with written consent of all parties; petitioners lodged their blanket consent with the Clerk, and *amicus* lodged respondents' consent with the Clerk. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no

has defended American sovereignty, a strong national defense, and adherence to the separation of powers under the U.S. Constitution. For all these reasons, EFELDF has direct and vital interests in the issues before this Court.

STATEMENT OF THE CASE

These consolidated actions concern the lawfulness of Executive Order No. 13,780, 82 Fed. Reg. 13,209 (2017) (the "Order").[2] Section 2 of the Order paused and directed study of immigration from six state sponsors or shelters of terrorism; Section 6 of the Order similarly paused and directed study of refugee admissions and caps the number of refugees for 2017. Both sections implement authority delegated to the President by the Immigration and Naturalization Act, 8 U.S.C. §§1101-1537 ("INA"). *See* 8 U.S.C. §§1182(f), 1157(a)(2)-(3). The plaintiffs are the State of Hawaii, various individuals, and various organizations who claim that the Order violates due process and discriminates against Islam because the six covered nations all are Muslim-majority countries.

The Government seeks review of two preliminary injunctions. In No. 16-1436, it seeks review of the

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counsel for a party authored this brief in whole or in part, and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to the brief's preparation or submission.

[2] The Order is reprinted at Pet. App. 289a-312a. The Order followed on – and superseded – an earlier executive order, 82 Fed. Reg. 8977 (2017), which was also preliminarily enjoined. *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017).

injunction upheld by the U.S. Court of Appeals for the Fourth Circuit in *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017) (*en banc*) ("*IRAP*"). In No. 16-1540, it seeks review of the injunction upheld by the U.S. Court of Appeals for the Ninth Circuit in *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017) ("*Hawaii*"). Although the Order is facially neutral with respect to religion, *IRAP* perceives violations of the Establishment Clause from anti-Muslim animus allegedly demonstrated in extra-record statements, primarily from the election campaign. Although it rejected the lower court's views on the Establishment Clause, *Hawaii* found that the President failed to make sufficient findings to support the Order, violated procedures that 8 U.S.C. §1157 purportedly requires to alter the annual cap on refugee admissions, and discriminated on the basis of national origin under 8 U.S.C. §1152(a)(1)(A).

SUMMARY OF ARGUMENT

At the outset, no party has standing to press the alleged religious-freedom issues found below because the Order does not affect *the plaintiffs'* religious rights and aliens abroad have no constitutional rights here (Sections I.B.2-I.B.3); similarly, plaintiffs would lack third-party standing to assert aliens' rights, if aliens abroad had any rights (Section I.B.1). The plaintiffs' claim that the Order stigmatizes them as Muslims fails because the Order does not target these plaintiffs and subjective, third-party stigma is insufficiently concrete for Article III (Section I.B.4); the plaintiffs' other injuries are insufficiently concrete or speculative (Section I.B.5). Because plaintiffs failed to exhaust the Order's hardship-waiver provision, any

hardship-based claims are not ripe (Section I.C). Similarly, with respect to jurisdiction, the Order falls under the consular nonreviewability doctrine (Section I.D) and outside the waiver of sovereign immunity in the Administrative Procedure Act ("APA") as committed to agency discretion by law (Section I.E).

On the immigration merits, the Order implements plenary authority that INA delegates to the President with no law for a reviewing court to apply in checking the President's power (Sections II.A.1-II.A.2). As to the INA violations found in *Hawaii*, §1152(a)(1)(A) – which bars discrimination because of race, national origin, and other criteria – is best read as applying only within the class of *qualified* visa applicants, not to the entire universe of *potential* visa applicants. The class of qualified visa applicants protected by §1152(a)(1)(A) should exclude applicants disqualified based on other, *nondiscriminatory* criteria under §1182(f), such as applicants from failed states or state sponsors of terrorism. That reading not only is consistent with the canons of construction for anti-discrimination statutes, but also avoids a repeal by implication of §1182(f) without the required "clear and manifest" congressional purpose (Section II.A.3).

On religion, the Order is facially neutral, lacking the selective persecution necessary for facially neutral laws to violate the Free Exercise Clause (Sections II.B.2, II.B.3). Significantly, because the Order does not disparately regulate religiosity or any religion (or atheism) but merely allegedly persecutes Muslims, the Establishment Clause is not applicable (Section II.B.2). The Religious Freedom Restoration Act, 42 U.S.C. §§2000bb-2000bb-4 ("RFRA") does not apply

because an alien abroad is not a protected RFRA "person" and plaintiffs here suffer no RFRA injuries (Section II.B.1). Finally, the plaintiffs have not made the strong showing needed to go beyond the administrative record to demonstrate impropriety (Section II.C.1) and – indeed – would exceed this Court's powers to fault the government for allegedly unconstitutional policy *proposals* (from the election campaign, no less) that both the campaign and subsequently the President amended to address constitutional concerns raised against the initial proposal (Section II.C.2), as recognized in *Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 84-86 (1961).

Even if it finds jurisdiction and an entitlement to a preliminary injunction, this Court should narrow the injunctions' overbroad scope. Basing a nationwide injunction on so slender an Article III basis violates the limits on facial challenges and class action that protect defendants: put simply, rather than a nationwide injunction based on cherry-picked and atypical facts, the plaintiffs deserved dismissal for failing to show the Order facially invalid under all circumstances (Section III.B). In any event, this type of overbroad injunction effectively denies the Court the opportunity for multiple circuits to address an issue and should thus be rejected (Section III.A).

ARGUMENT

I. THIS COURT HAS JURISDICTION, BUT THE PLAINTIFFS' CLAIMS ARE NOT JUSTICIABLE.

"'All of the doctrines that cluster about Article III – not only standing but mootness, ripeness,

political question, and the like – relate in part, and in different though overlapping ways, to ... the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.'" *Allen v. Wright*, 468 U.S. 737, 750 (1984) (*quoting Vander Jagt v. O'Neill*, 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring)). These cases demonstrate many of the potential Article III transgressions that Judge Bork and this Court have cautioned federal courts to avoid. It thus falls to this Court to reel in the lower courts' excesses here.

Although this Court has appellate jurisdiction over these matters, the plaintiffs lack jurisdiction to press their claims:

> Every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review[. ...] And if the record discloses that the lower court was without jurisdiction[, ... and] we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.

Steel Co. v. Citizens for a Better Env't., 523 U.S. 83, 95 (1998) (quotations and citations omitted). Because plaintiffs' claims are not justiciable, this Court must remand these cases with orders to dismiss them.

A. These actions are not moot.

The Order did not expire after the originally contemplated review period because the injunctions prevented the Order from taking effect in the first place. In any event, the President has extended the term of the Order until a prescribed interval (*e.g.*,

ninety days) *after* the Order takes full effect by the lifting of the injunctions. Gov't Br. at 36-37. As such, these cases are not moot and still require this Court's intervention.[3]

B. The plaintiffs lack standing.

Under Article III, federal courts are limited to hearing cases and controversies, U.S. CONST. art. III, §2, which is relevant here primarily in the "bedrock requirement" of standing. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.* 454 U.S. 464, 471 (1982). This limit is "fundamental to the judiciary's proper role in our system of government." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976). In both its constitutional and prudential strands, standing is "founded in concern about the proper – and properly limited – role of the courts in a democratic society." *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (interior quotations and citations omitted).

Plaintiffs must – and cannot – establish standing for each form of relief they seek: "standing is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). The following five subsections emphasize how plaintiffs have failed to establish standing.

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[3] The Government's brief explains that two plaintiffs (Dr. Ismail Elshikh and Doe #1) have subsequently had their relatives receive visas, Gov't Br. at 20, which would moot whatever claim those plaintiffs had to get the relatives' visas.

1. Plaintiffs lack standing to raise the rights of aliens abroad.

Even if aliens abroad had constitutional rights, the plaintiffs here would lack third-party standing to assert those rights. *Kowalski v. Tesmer*, 543 U.S. 125, 128-30 (2004). While plaintiffs may assert their own rights, if any, they must do so under the standards applicable to those rights, without any heightened scrutiny applicable to the third parties' rights. *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 263 (1977).

2. Plaintiffs do not – themselves – suffer cognizable religious injury.

To the extent that they seek to assert free-exercise claims against the Order, plaintiffs must show how the Order coerces *their* religion, not the rights of third parties. *Harris v. McRae*, 448 U.S. 297, 320 (1980). As in *McRae*, however, the challenged action has no effect whatsoever on plaintiffs' religious exercise. *Id.* By the same token, membership groups cannot press these claims. *Id.* at 321 (*citing Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963)). Consequently, plaintiffs cannot assert religious rights of their own.

3. Aliens abroad lack cognizable rights under the Constitution.

The only people whom the Order affects directly – aliens abroad -- simply do not have rights under our Constitution relevant to this litigation. *Boumediene v. Bush*, 553 U.S. 723, 755-62 (2008). Particularly, "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). Even an order banning Muslims on

the basis of religion would not violate constitutional rights of would-be immigrants. Without a right, aliens abroad cannot suffer cognizable Article III injury.

4. **Plaintiffs' claimed stigmatic injury is insufficiently concrete.**

The claimed stigma injuries from the Order are insufficient because only "those ... personally denied equal treatment by the challenged discriminatory conduct" can assert stigma injuries. *Wright*, 468 U.S. at 755. With religious rights, a contrary holding effectively would eliminate the restrictions that this Court has placed on such litigation under *Abington Township*, *McRae*, and their progeny. If subjectively hurt feelings could satisfy Article III, anyone could sue about anything.

5. **Plaintiffs' economic and other non-religious injuries are speculative.**

The plaintiffs' other asserted injuries also fail. For example, Hawaii claims economic loss from tourists and lost student and faculty interactions with state universities. Without concrete particulars, this type of future injury is insufficient: "'some day' intentions – without any description of concrete plans, or indeed even any specification of when the some day will be – do not support a finding of the 'actual or imminent' injury that our cases require." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992). Conversely, where sufficiently imminent injury is involved, the injury could be ameliorated under the Order's hardship provisions.

C. Plaintiffs' hardship-based claims are not ripe.

Although the Order allows case-by-case waivers for instances of undue hardship, Order, §3(c) (Pet. App. 301a-303a), plaintiffs never sought such waivers. As such, claims based on such perceived hardships are not ripe.

Specifically, "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. U.S.*, 523 U.S. 296, 300 (1998) (internal quotations and citations omitted); *cf. Shalala v. Ill. Council on Long Term Care*, 529 U.S. 1, 12-13 (2000) ("principles of 'ripeness' and 'exhaustion of administrative remedies' ... normally require channeling a legal challenge through the agency"). It is unclear how plaintiffs' relatives, students, or lecturers would have fared under the Order's hardship provision, so claims based on perceived hardships are simply not ripe.[4]

D. The "consular nonreviewability" doctrine precludes judicial review.

In a doctrine related to aliens abroad lacking any cognizable right to enter the United States, courts also have found consular decisions to exclude aliens not open to judicial review. This doctrine of consular

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[4] Significantly, injuries that qualify as sufficiently immediate under Article III can nonetheless fail to qualify under the higher bar for irreparable harm. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149-50, 162 (2010). Either issue would independently justify reversal, either jurisdictionally (ripeness) or equitably (lack of irreparable harm).

nonreviewability also precludes plaintiffs' suits to the extent that the suits rely on the rights or injuries of aliens abroad.

By way of analogy, for most of our history, aliens detained *at our border* could challenge the detention only by *habeas corpus*. *Ekiu v. U.S.*, 142 U.S. 651, 660 (1892). In *Brownell v. We Shung*, 352 U.S. 180, 184-85 (1956), *abrogated by* PUB. L. NO. 87-301, §5(b), 75 Stat. 650, 653 (1961) ("[n]otwithstanding the provisions of any other law, any alien against whom a final order of exclusion has been made ... may obtain judicial review of such order by habeas corpus proceedings and not otherwise"[5]), this Court (briefly) allowed such aliens also to proceed via an APA suit. But *Brownell* expressly did "not suggest, of course, that an alien who has never presented himself at the borders of this country may avail himself of the declaratory judgment action by bringing the action from abroad." 352 U.S. at 184 n.3. Thus, even under *Brownell*, aliens abroad had no right to litigate the bases for their admission into the United States.

Other than that inapposite short window – which Congress slammed shut in 1961 – the federal courts have uniformly held consular immigration decisions regarding aliens abroad immune from judicial review. *See Saavedra Bruno v. Albright*, 197 F.3d 1153, 1160 (D.C. Cir. 1999) (collecting cases). As this Court recently reiterated, such history provides "convincing support for the conclusion that Congress accepted and ratified the unanimous" judicial interpretations of a

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[5] The post-1996 version of this provision is codified at 8 U.S.C. §1252(g).

statute. *Texas Dep't of Housing & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507, 2520 (2015). In APA parlance, the "agency action [here] is committed to agency discretion by law" under 5 U.S.C. §701(a)(2), and thus falls under one of the "limitations on judicial review" recognized in 5 U.S.C. §702(1), notwithstanding APA's otherwise generous judicial review.[6]

E. Sovereign immunity bars relief.

"The United States, as sovereign, is immune from suit save as it consents to be sued." *U.S. v. Sherwood*, 312 U.S. 584, 586 (1941). "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit," without regard to any perceived unfairness, inefficiency, or inequity. *Dept. of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999).[7] Moreover, such waivers are strictly construed, in terms of their scope, in favor of the sovereign. *Lane v. Pena*, 518 U.S. 187, 192 (1996). In the 1976 amendments to 5 U.S.C. §702, Congress "*eliminat[ed]* the sovereign immunity defense in *all equitable actions* for specific relief against a Federal agency or officer acting in an official

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[6] The lack of APA-INA review would not necessarily preclude *constitutional* review, *Webster v. Doe*, 486 U.S. 592, 603-04 (1988); *Fong Yue Ting v. U.S.*, 149 U.S. 698, 713 (1893), but plaintiffs here cannot establish any constitutional violations.

[7] The officer-suit exception in *Ex parte Young*, 209 U.S. 123 (1908), offers a limited exception to sovereign immunity, but only with *ongoing violations* of federal law. *Green v. Mansour*, 474 U.S. 64, 66-67 (1985). Here, there is no ongoing violation of law.

capacity." *Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C. Cir. 1982) (*quoting* S. Rep. No. 996, 94th Cong., 2d Sess. 8 (1976); H.R. Rep. No. 1656, 94th Cong., 2d Sess. 9 (1976), 1976 U.S. Code Cong. & Admin. News 6121, 6129) (R.B. Ginsburg, J.). But that waiver has restrictions.

Specifically, the APA waiver neither "affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground," nor "confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. §702(1)-(2); *accord id.* at §701(a)(1) (no review "to the extent that ... statutes preclude judicial review"). In addition to restrictions on review in the organic INA itself, *see* Section I.D, *supra* (discussing doctrine of consular nonreviewability), review is also precluded "to the extent that ... agency action is committed to agency discretion by law." 5 U.S.C. §702(2). One sign that Congress has committed an issue to executive officers' discretion is when a reviewing court would have "no law to apply" in reviewing the agency action. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Here, Congress has not given a reviewing court the "law to apply" – much less access to the required classified information – needed to evaluate plaintiffs' claims.

II. THE EXECUTIVE ORDER IS ENTIRELY LAWFUL.

To the extent that jurisdiction exists for plaintiffs' claims, the claims lack merit under both INA and the

Constitution. Accordingly, this Court should vacate the injunctions.

A. Plaintiffs lack an INA cause of action, and the Order is lawful under INA.

The Constitution gives Congress, and thus its enforcement and rulemaking delegates in the Executive, plenary authority over immigration. U.S. CONST. art. I, §8, cl. 4; *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972). Nothing in INA authorizes the lower courts' intrusion into the Government's handling of the national-security issues presented by the Order.

INA delegates exceedingly broad power to the President to regulate immigration in this context:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. §1182(f). In doing so, Congress neither gave plaintiffs nor the judiciary a basis for second-guessing (or even reviewing) the President's actions.

1. The President acted appropriately under §1182(f), which is not subject to review.

At the outset, as indicated, aliens abroad have "no constitutional rights" regarding admission into the United States. *Plasencia*, 459 U.S. at 32. Moreover

and more generally under INA, "[j]udicial power over immigration and naturalization is extremely limited," *Miller v. Albright*, 523 U.S. 420, 455 (1998) (Scalia, J., concurring in judgment), because of the relative interests and powers of the three branches:

> "Our cases 'have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'"

Id. (*quoting Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (*quoting Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 210 (1953)). Accordingly, *amicus* EFELDF respectfully submits that the lower courts' reliance on Justice Kennedy's concurrence – with Justice Alito – in *Kerry v. Din*, 135 S.Ct. 2128 (2015), is misplaced.

The concurrence posits that the wife of a denied applicant could "look behind" exclusion of an alien abroad, notwithstanding *Mandel*, upon making "an affirmative showing of bad faith on the part of the consular officer" who denied the alien's visa. *Id.* at 2141 (Kennedy, J., concurring). In making that claim, however, the concurrence expressly distinguished the statute at issue in *Din* from the one in *Mandel*:

> [U]nlike the waiver provision at issue in *Mandel*, which granted the Attorney General nearly unbridled discretion, §1182(a)(3)(B) specifies discrete factual predicates the consular officer must find to exist before denying a visa.

Id. at 2140-41. Significantly, these cases involve the *President*, and *Mandel* involved the *Attorney General*, whereas *Din* involved a consular officer. Unlike the

executive officers here and in *Mandel*, *Din* involved one officer of hundreds similarly situated in the agency, who as such is not entitled to policy-based deference, *U.S. v. Mead Corp.*, 533 U.S. 218, 227-28 (2001). Moreover, the statute there required him to make a factual finding. 8 U.S.C. §1182(a)(3)(B). By contrast, Congress did not require the same specificity from the President, 8 U.S.C. §1182(f), and a reviewing court would have "no law to apply" in reviewing the President's action. *Overton Park*, 401 U.S. at 410. In the President's case, therefore, judicial review is not available. 5 U.S.C. §701(a)(2). To say one consular officer of hundreds may be called upon for more specificity in that context does not authorize a reviewing court to compel *the President* to do so under §1182(f).

2. The Order is not subject to courtroom factfinding or judicial second guessing.

To some extent, courts' willingness to look behind executive or legislative action depends on the context. With regard to immigration decisions regarding aliens abroad and the First Amendment, it is enough that Congress or its delegates in the Executive Branch provide a "facially legitimate and bona fide" basis for exclusion, *Mandel*, 408 U.S. at 769, which equates to rational-basis review. *IRAP*, 857 F.3d at 589 n.14 (collecting cases) (Pet. App. 40a n.14); *accord Fiallo*, 430 U.S. at 794. This Court recently classified it as "minimal scrutiny (rational-basis review)." *Sessions v. Morales-Santana*, 137 S.Ct. 1678, __ (2017) (slip op. at 15). Under that deferential review, legislative choices are "not subject to courtroom fact-finding and may be

based on rational speculation unsupported by evidence or empirical data," *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993). Deference is particularly appropriate here, given the "extremely limited" review available in this context. *See* Section II.A, *supra*. This Court should follow *Mandel* and *Fiallo* by declining to second-guess the Executive on issues of national security.

3. The President's authority under §1182(f) is not bounded by §1152(a)(1)(A).

Hawaii found the Order to violate §1152(a)(1)(A) by discriminating on the basis of national origin against visa applicants from the Order's six targeted countries. *See* 8 U.S.C. §1152(a)(1)(A) ("no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence"). Notwithstanding the surface appeal of that text-based argument, the cited provision did not enact an equal-protection clause for alien visa applicants. As the Government points out, Gov't Br. at 50-54, this later-enacted clause did not repeal the more specific §1182(f) by implication.[8]

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[8] With regard to the Order's *reducing* the cap on refugee admissions, nothing in §1157 precludes the President's taking that action, whether announced in an executive order or not. Although that section has provisions for *increasing* the pre-arranged cap in case of an emergency, 8 U.S.C. §1152(b), the section does not impose any requirement that caps be met.

"[R]epeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007)) (alteration in original, interior quotations and citations omitted). With regard to "clear and manifest" intent to alter extant legislation, this Court's preemption cases choose the non-preemptive reading if plausible. *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) ("[w]hen the text ... is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption") (internal quotations omitted). EFELDF respectfully submits that the lower courts' reading of §1152(a)(1)(A) would impermissibly repeal §1182(f) by implication.

To avoid that result, this Court should recognize that the phrase that Congress used in §1152(a)(1)(A) – namely, "discriminated against [a person] ... because of the person's ... nationality, place of birth, or place of residence" – does not apply to permissible disparate treatment because of other nondiscriminatory criteria (*e.g.*, failed-state or state-sponsor-of-terrorism status). *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979). Failed states lack the governmental infrastructure needed to vet a visa applicant, and state sponsors of terrorism cannot be trusted to aid accurately in vetting visa applicants. Thus, excluding visa applicants from such states is done *because of* the failed-state or terrorism status, not *because of* the criteria in §1152(a)(1)(A). Of course, Congress would have been aware how courts read discrimination-because-of-status statutes and that "an individual's right to equal protection of the

laws does not deny ... the power to treat different classes of persons in different ways." *Johnson v. Robison*, 415 U.S. 361, 374-75 (1974) (interior quotations omitted, alteration in original). The Order is entirely consistent with precedent under disparate-treatment statutes.

To harmonize the two sections, this Court should read §1152(a)(1)(A) to apply only to the class of visa applicants who remain, after the Government applies any *nondiscriminatory* bases for exclusion. If read this way, §1152(a)(1)(A) would prohibit discrimination *because of* the listed criteria for all qualified visa applicants, without considering any would-be visa applicants disqualified by nondiscriminatory criteria under §1182(f).

B. The Order does not violate the religious freedoms of anyone.

IRAP enjoined the Order to halt the purportedly ongoing violation of religious rights. As explained in this section, no such rights have been violated.

1. Plaintiffs lack a RFRA cause of action.

Significantly, RFRA does not protect the religious interests of aliens abroad, and the plaintiffs here do not suffer RFRA injuries.[9] RFRA applies to "persons,"

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[9] RFRA concerns laws that "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," 42 U.S.C. §2000bb-1(a), which Congress enacted to restore strict-scrutiny requirements for Free-Exercise claims under *Sherbert v. Verner*, 374 U.S. 398 (1963), in response to *Employment Division v. Smith*, 494 U.S.

and the scope of that term is not defined, but can be inferred from the pre-RFRA usage that Congress intended to restore. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2773-74 (2014); *cf. Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 315-16, 318-19 (1978). Our courts have never entertained the free-exercise rights of aliens abroad, and the plaintiffs are not burdened in the exercise of *the plaintiffs'* religion. *See* Section I.B.2, *supra*. Accordingly, RFRA does not apply.

2. Plaintiffs' religious claims fall under the Free-Exercise Clause, not the Establishment Clause.

Our Constitution both prohibits establishment of religion and protects the free exercise of religion. U.S. CONST. amend. I, cl. 1-2. "Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom." *Engel v. Vitale*, 370 U.S. 421, 430 (1962); *see generally* Carl H. Esbeck, *Differentiating the Free Exercise and Establishment Clauses*, 42 J. CHURCH & ST. 311, 320-25 (2000). Although the lower courts analyzed these cases as Establishment-Clause cases, the gravamen of plaintiffs' claims is that the Order singles Muslims out for ill treatment, which – if true – would violate the Free Exercise Clause.

Even as plaintiffs misread it, the Order does not "demonstrate a preference for one particular sect or

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872, 890 (1990) (allowing as-applied infringement of religious freedom by facially neutral government actions). *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006).

creed (including a preference for Christianity over other religions)" under the Establishment Clause. *See County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 605 (1989). Instead, they see the Order as pitting Muslims against every other conceivable form of religiosity or non-religiosity (*e.g.*, atheists, Buddhists, Christians, Druids, Hindus, Jews, pagans). That would constitute persecution, not establishment:

> At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs... Indeed, it was historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause. These principles, though not often at issue in our Free Exercise Clause cases, have played a role in some. In *McDaniel v. Paty*, for example, we invalidated a state law that disqualified members of the clergy from holding certain public offices, because it imposed special disabilities on the basis of religious status. On the same principle, in *Fowler v. Rhode Island*, we found that a municipal ordinance was applied in an unconstitutional manner when interpreted to prohibit preaching in a public park by a Jehovah's Witness but to permit preaching during the course of a Catholic mass or Protestant church service.

Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 532-33 (1993) (internal quotations, citations, and Court's alterations omitted). Of course, a

secondary "purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand." *Engel*, 370 U.S. at 432. But the Order advances neither atheism nor any one religion, even if it did punish Islam.

While the Establishment Clause applies to both "the advancement [and] inhibition of religion," *Sch. Dist. of Abington Twp.*, 374 U.S. at 222, the inhibition prong has always required some form of affirmative disparate regulation. *Larson v. Valente*, 456 U.S. 228, 246 (1982) (rule "clearly grants denominational preferences of the sort consistently and firmly deprecated in our precedents").[10] The Order is religiously neutral, but even as plaintiffs misread it, the Order is simply an attack on Muslims, with no preference for any other religion or atheism. This Court should not extend the Establishment Clause to cover subjectively perceived targeting of one religion, with no governmental attempt to regulate religion.

3. The Order does not violate religious freedom.

Under *Smith*, 494 U.S. at 879 (interior quotation omitted), "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability." Because the Order is such as "valid and neutral law," plaintiffs fail to state a claim under the religious clauses, *unless* the Court not only allows the entry of information outside

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[10] In more typical Establishment-Clause cases, the government *advances* religion, such as school prayers. *See, e.g.*, *Engel*, 370 U.S. at 430.

the Order's administrative record but also credits the information as establishing an impermissible motive. Section II.C, *infra*, rebuts the non-record information, and this section demonstrates the appropriateness of the Order under the religious clauses.

On its face, the Order is neutral with respect to religion, applying not only to the Muslim majorities in the affected countries but also to religious minorities who seek to emigrate. Similarly, the Order does not affect the vast majority of Muslims worldwide, further belying the suggestion of disparate treatment *because of religion*. While the Order disparately impacts Muslims, that correlation is not surprising, given the current historical correlation between Islam and both failed states and sponsors of terrorism.

A famous statistical study showed that birthrates in seventeen countries correlate heavily with those countries' stork populations. Robert Matthews, *Storks Deliver Babies ($p = 0.008$)*, 22:2 TEACHING STATISTICS: AN INT'L JOURNAL FOR TEACHERS, at 36 (2000). The statistical inference that storks deliver babies clearly "mistakes correlation for causation." *Woodford v. Ngo*, 548 U.S. 81, 94 n.4 (2006); Matthews, *Storks Deliver Babies*, 22:2 TEACHING STATISTICS, at 36-37. The same type of mistake underlies the lower court's reasoning from disparate impacts to intentional discrimination. Mere correlation *with religion* is not discrimination *because of religion*. *Feeney*, 442 U.S. at 279; *Larson*, 456 U.S. at 246 n.23; *McGowan v. Maryland*, 366 U.S. 420, 564 (1961). On its face, at least, the Order is entirely neutral with respect to religion.

Even religion is not sacrosanct under the Constitution. Thus, while "for temporal purposes,

murder is illegal, ... the fact that this agrees with the dictates of the Judeo-Christian religions while it may disagree with others does not invalidate the regulation." *McGowan*, 366 U.S. at 442. Sadly, recent history and the record here suggest that significant segments of worldwide Islam support harming Americans. *IRAP*, 857 F.3d at 575 n.5 (Pet. App. 10a n.5). While most Muslims are not murderous jihadis, significant numbers are, and our enemies actively use immigration to gain access. Order, §1(e) (Pet. App. 293a-297a). Under the circumstances, pausing immigration from countries associated with terrorism is not irrational: "while the Constitution protects against invasions of individual rights, it is not a suicide pact." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963). In any event, aliens abroad have no religious rights here, Section I.B.3, *supra*, so the Court need not decide whether the Order violates religious-freedom rights.

C. Non-record statements – especially ones predating the President's oath of office – do not control here.

Recognizing that no one protested when the prior administration acted against the same countries, *see* Kate M. Manuel, Acting Section Research Manager. Congressional Review Service, *Executive Authority to Exclude Aliens: In Brief*, at 6-10 (2017) (listing prior presidents' exclusions), plaintiffs seek to find discriminatory intent by the current administration officials based on non-record statements, primarily ones predating the defendants' oaths of office. As explained, however, the extra-record statements are simply not relevant here.

As indicated, there is no judicial review for aliens abroad, *see* Sections II.A.1-II.A.2, *supra*, but *IRAP* also violated this Court's precedents for domestic religious claims. With regard to the religious rights of those already within the U.S., the inquiry can be more searching: "Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices." *Lukumi Babalu*, 508 U.S. at 547. Because no one in this litigation has standing to assert religious rights, *see* Sections I.B.1-I.B.3, *supra*, the Court need not consider this line of inquiry. To the extent that the Court pursues this line of inquiry, the plaintiffs cannot make the selective-enforcement showing that the *Lukumi Babalu* plaintiffs made, see Section II.B.3, *supra*; Sections II.C.2-II.C.3, *infra*, so the plaintiffs cannot prevail.

1. The plaintiffs have not made an *Overton Park* showing for going beyond the administrative record.

Courts typically base judicial review of executive action on the administrative record before the agency when it acted, *Overton Park*, 401 U.S. at 420. Assuming *arguendo* it were otherwise permissible and relevant to go outside the record to review statements during the election campaign, on Twitter, and the like, the plaintiffs would need "a strong showing of bad faith or improper behavior" before expanding review to include materials in addition to the governmental findings that accompanied the Order. *Id.*; *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) ("only the clearest proof could suffice to establish the unconstitutionality of a statute on [the] ground of [improper legislative motive]"). "[J]udicial inquiries into legislative or

executive motivation represent a substantial intrusion into the workings of other branches of government" and are "therefore 'usually to be avoided.'" *Arlington Heights*, 429 U.S. at 268 n.18 (*quoting Overton Park*, 401 U.S. at 420). As explained below, the plaintiffs have not produced anything near the "clearest proof" or even made a "strong showing" of anything improper.

2. Statements about prior policy iterations are irrelevant.

The lower courts erred by reaching back into pre-election campaign statements, including original statements that the candidate subsequently revised to accommodate constitutional concerns. The courts' error lies not only in the practical import and equity but also in the institutional competences of the respective branches of government.

As a matter of simple fairness and equity, a court should not hold an officer to initial plans when that officer changes plans based on input from stakeholder groups and affected agencies. Particularly for political outsiders, learning on the job is necessary.

More importantly, however, the lower courts' approach is outside the judicial power. Specifically, "treat[ing an] Act as merely a ruse by Congress to evade constitutional safeguards" "would be indulging in a revisory power over enactments as they come from Congress – a power which the Framers of the Constitution withheld from this Court – if we so interpreted what Congress refused to do and what in fact Congress did." *Subversive Activities Control Bd.*, 367 U.S. at 85. In *Subversive Activities Control Board*, the initial bills would have targeted the Communist

Party by name and effectively outlawed it, but – in response to constitutional questions raised against that approach – Congress amended the bill to target certain activities, *id.*, which the Court upheld without regard to the alleged constitutional defects of the bills as first proposed.

There, like here, when presented with the argument that regulating one way would violate the Constitution, the Government changed the focus of the legislation to achieve a desired end lawfully. The Court did not inquire whether "the Act is only an instrument serving to abolish the Communist Party by indirection" because the "true and sole question before us is whether the effects of the statute as it was passed and as it operates are constitutionally permissible." *Id.* at 84-86. Similarly here, the Court must evaluate what the Government did, once the new administration was fully installed, not what they thought about doing before they took office.

3. The President's recent tweets in defense of the first order and against "political correctness" are neither relevant nor anti-Muslim.

As this Court has said of Twitter, "[p]rejudice can come through a whisper or a byte." *Dietz v. Bouldin*, 136 S.Ct. 1885, 1895 (2016). After the Government's petition and applications were filed, the President went online to lament courts as "slow and political," to characterize the Order as a "watered down" and "politically correct version" of the first order, and to identify the need for a "much tougher version." Glenn Thrush, *National Desk: Online Defiance Starts Early at the Oval Office*, N.Y. TIMES, June 7, 2017, at A18.

These tweets are irrelevant because they do not constitute anti-Muslim prejudice and cannot elevate review of the second Order into review of the superseded first order. In effect, the tweets are inadmissible because they are irrelevant.

At the outset, however much the President or the plaintiffs want this Court to evaluate the first order, this Court lacks jurisdiction for an advisory opinion on that topic. Federal courts cannot render advisory opinions because their Article III jurisdiction extends only to cases or controversies presented by affected parties. *Muskrat v. U.S.*, 219 U.S. 346, 356-57 (1911). If the President wants to do another order, courts will have to wait for that eventuality; whatever was in the first order is now moot.

Similarly, as explained in Sections II.B.3 (no anti-Muslim prejudice) and II.C.2 (prior versions do not impugn amended policies), *supra*, these tweets do not express any unconstitutional or otherwise improper motive. If the tweets portend any future action, courts will have to assess the legality of those actions when that future action occurs, if it occurs at all.

On the question of political correctness, however, the President's tweet did not reflect prejudice against peaceful and lawful Muslims. Instead, the President campaigned on frustration with political correctness, including officials' classifying Islamic terrorist action with euphemisms such as "workplace violence." Brooke Goldstein & Benjamin Ryberg, *The Emerging Face of Lawfare: Legal Maneuvering Designed to Hinder the Exposure of Terrorism and Terror Financing*, 36 FORDHAM INT'L L.J. 634, 653 (2013). Calling Islamic terrorism by its name and trying to

understand its roots should not offend anyone – Muslim or not – who opposes terrorism.

III. THE NATIONWIDE INJUNCTIONS WOULD BE OVERBROAD, EVEN ASSUMING THAT ANY PLAINTIFF HAD A MERITORIOUS AND JUSTICIABLE CLAIM.

For practical, jurisprudential, and jurisdictional reasons, "[i]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Thus, even if this Court finds that some aspect of the injunction should remain in place, the Court nonetheless should narrow the injunction.

A. Overbroad nationwide injunctions deprive this Court to the percolating effect of multiple circuits reaching an issue.

Nationwide injunctions effectively preclude other circuits from ruling on the constitutionality of the enjoined agency action. In addition to conflicting with the principle that federal appellate decisions are binding only within the court's circuit, *see, e.g.*, *U.S. v. Glaser*, 14 F.3d 1213, 1216 (7th Cir. 1994), nationwide injunctions "substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue," which deprives the Court of the benefit of decisions from several courts of appeals. *U.S. v. Mendoza*, 464 U.S. 154, 160 (1984). That practical harm is reason enough to trim the nationwide injunctions.

B. Providing facial relief in as-applied challenges frustrates this Court's precedents on facial and class actions.

Overbroad injunctions can convert an as-applied challenge into a facial challenge or class action, without the procedural safeguards that protect defendants in those other two contexts. Allowing such suits to proceed in that manner would trammel defendants' rights, which is particularly problematic for the public interest when the suit is against the Government.

Where the relief would reach beyond the particular parties' circumstances, the party seeking that relief "must ... satisfy [the] standards for a facial challenge to the extent of that reach." *Doe v. Reed*, 561 U.S. 186, 194 (2010). Indeed, where "claims are better read as facial objections" to a law, courts need "not separately address the as-applied claims." *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334, 2340 n.3 (2014). Of course, a "facial challenge to a legislative Act is ... the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *U.S. v. Salerno*, 481 U.S. 739, 745 (1987). Because "[t]he fact that [the law] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid," *id.*, prevailing in an as-applied challenge is simply not the same as prevailing in a facial challenge. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 568 (2011). Sympathetic individual plaintiffs cannot form the basis for nationwide facial relief, particularly

where those individual plaintiffs failed to exhaust the Order's hardship provisions.

Similarly, when plaintiffs with standing purport to represent a class of similarly situated persons or entities, the law requires that the protected class is indeed similarly situated. FED. R. CIV. P. 23(a)(1)-(4) (requiring commonality and typicality, as well as numerosity and adequacy of representation). Thus, this Court has "repeatedly held that a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 156 (1982) (interior quotations omitted). Thus, the rules also contemplate subclasses, FED. R. CIV. P. 23(c)(5), which can be required:

> Where differences among members of a class are such that subclasses must be established, we know of no authority that permits a court to approve a settlement without creating subclasses....

Amchem Prods. v. Windsor, 521 U.S. 591, 627 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831-32 (1999). Not every U.S. resident who wishes to interact here with foreign-based aliens can claim the same facts that Hawaii's universities and Dr. Elshikh claim, so not every such resident should benefit from facial relief that a court premised on those unusual facts.

Especially where the Order allowed case-by-case waivers for instances of undue hardship, this Court should not allow hijacking national policy based on atypical, cherry-picked facts.

CONCLUSION

For the foregoing reasons and those argued by the Government, this judgments of the Courts of Appeals should be reversed.

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Respectfully submitted,

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